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WISCONSIN SHOULD ADOPT THE DEATH PENALTY

JOHN C. MCADAMS*

Most Americans think the death penalty is appropriate for those who commit the most heinous crimes. Since 1985, Gallup (to cite only a single example) has consistently found seventy percent or more of the American population favoring capital punishment.¹ In Wisconsin, the state legislature has under consideration a bill that would provide for possible execution of persons guilty of first-degree intentional homicide of anyone who is younger than sixteen years old. This is a very modest and limited death penalty bill, yet it is controversial.

Should Wisconsin follow the path of other states that allow executions? Is the support of the majority of Americans—and the majority of American states—just a barbaric prejudice of some sort, or does this overwhelming majority have good reasons for believing as it does? In this case, the voice of the people is, if not the voice of God, at least the voice of sound moral judgment and practical reason.

The reasons to favor the death penalty are numerous.

COST

In principle, it is much cheaper to execute prisoners than to lock them up for life, or even for twenty or thirty year prison sentences. In 1990, for example, the average yearly cost to keep an offender in prison was \$15,496.² So it is deeply ironic that death penalty opponents argue that it is cheaper to incarcerate a prisoner for life than to execute him. But they are correct. As Radelet, Bedau, and Putnam put it:

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1. Alec Gallup & Dr. Frank Newport, *Death Penalty Support Remains Strong*, THE GALLUP POLL MONTHLY, June 1991, at 43.

2. BUREAU OF JUSTICE STATISTICS U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 13 (1992).

A criminal justice system (like Michigan's or Canada's) that never raises the controversial question of the death penalty in a murder case is far less expensive to operate than a system (like California's or Texas's) that regularly raises the issue in every case of aggravated murder.³

But why is this? Because death penalty opponents—or more properly activist lawyers among them—prevent timely executions and impose great costs on prosecutors with virtually endless appeals! In 1988, for example, former Supreme Court Justice Lewis Powell, Jr. reported that in Georgia the time between the commission of a murder and the execution of the murderer averaged close to ten years.⁴ This situation reminds me of the famous (and doubtless apocryphal) case in the English courts where a young man was accused of a horrible crime: killing both of his parents. He threw himself on the mercy of the court, asking for leniency because he was an orphan!⁵ Thus opponents of capital punishment, having vastly inflated the cost of executing murderers, argue that it is cheaper not to do so.

Realizing any cost saving through capital punishment requires instituting reforms similar to those proposed by the Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, which was chaired by Justice Powell. That committee concluded that capital cases “should be subject to one fair and complete course of collateral review in the state and federal system, free from time pressure of impending execution and with the assistance of competent counsel.”⁶ Death penalty opponents have fussed and fumed that such proposals “shortcut” the civil rights of the prisoner.⁷ However, they have not bothered to explain how there is a “civil right” to file appeal after appeal.

DETERRENCE

Death penalty opponents will often flatly state that the evidence shows that executions do not deter murder. The logic of such claims about the evidence is usually questionable at best. For example, death

3. MICHAEL L. RADELET ET AL., *IN SPITE OF INNOCENCE* 277 (1992).

4. Lewis F. Powell, Jr., *Commentary: Capital Punishment*, 102 HARV. L. REV. 1035, 1038 (1989).

5. This story must be apocryphal since it supposedly took place in an English court. Had it supposedly taken place in California, I would have seriously entertained the possibility that it really happened.

6. Ad Hoc Comm. on Fed. Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. (BNA) 3239, 3240 (Sept. 27, 1989).

7. Stephen Reinhardt, *Must We Rush the Executioner?* L.A. TIMES, Nov. 7, 1989, at B7.

penalty opponents will claim that murderers act in a fit of rage, utterly out of control, and oblivious to the consequences of their act. Clarence Darrow, for example, argued:

Quarrels between husbands and wives, disappointed love, or love too much requited cause many killings. They are the result of primal emotions so deep that the fear of death has not the slightest effect in preventing them. Spontaneous feelings overflow in criminal acts, and consequences do not count. Then there are cases of sudden anger, uncontrollable rage. The fear of death never enters into such cases: if the anger is strong enough, consequences are not considered until too late.⁸

One problem with this argument is that even if it is true of some murderers, it may well be untrue of others. And deterring those "others" may be quite worthwhile.

But even leaving that aside, this sort of claim about people being oblivious to consequences is mere supposition. At least equally plausible is the observation of Harvard psychologist Richard Herrnstein: "when your wife gets mad and starts throwing dishes, she always throws the cheap stuff, she never throws the good china." Readers might ask themselves how they would act if enraged by a comment from their boss. Would they necessarily attack, or at least verbally "tell off" the boss? Or would their probability of doing that depend heavily on the boss' expected reaction, how much they like the job and fear losing it, and what protections they have (Civil Service, union, etc.) that might allow them to anger the boss with impunity?

However, speculation on this issue—even plausible speculation—is less convincing than hard evidence. And the evidence is that crimes of "passion" and crimes committed by "enraged" people can be deterred. The evidence is clear, for example, that assaults can be deterred by the certainty and severity of punishment.⁹ Conceptually, assault is very similar to murder. A murder can be viewed as a particularly violent—and competently executed—assault. If the likelihood of punishment can deter an enraged person who wishes to beat or bludgeon

8. Clarence Darrow, *The Futility of the Death Penalty*, 80 THE FORUM 327, 328-29 (Sept. 1928).

9. Isaac Ehrlich, *Participation in Illegitimate Activities: A Theoretical and Empirical Investigation*, 81 J. POL. ECON. 521 (1973). Ehrlich notes that "the estimated elasticities [i.e., deterrent effect of punishment] of crimes against the person with respect to probability and severity of punishment are not lower on the average than those associated with crimes against property." *Id.* at 552. This, of course, is not what we would expect if we believe crimes against property are based on calculating self-interest, while crimes against persons are crimes of "hate and passion" and cannot be deterred.

someone, it is hard to see how a would-be murderer would react differently. And indeed, evidence clearly indicates that punishment deters murders.¹⁰ Note that I said "punishment," rather than "capital punishment." The evidence on capital punishment specifically will be discussed shortly. For now, the key point is that the probabilities of arrest, conviction, and imprisonment clearly act to deter murders. Thus people's behavior—even the behavior of "enraged" people—is affected by the likely consequences that may follow from their acts.¹¹

When death penalty opponents move beyond generic models of human behavior to examine crime statistics, their arguments only barely improve. They will point out, for example, that Texas has the death penalty while Wisconsin does not, yet Wisconsin has fewer murders than Texas. This argument ignores the fact that different states have different cultures, people with different backgrounds, and would have vastly different murder rates regardless of anything the criminal justice system does. It is likely that the same Texas culture, heavily influenced by the Old West, renders Texans more accepting of the death penalty, more likely to carry weapons, and more likely to settle arguments with violence. It is vastly implausible speculation to say that abolishing the death penalty in Texas would reduce the murder rate there to the level that prevails in Wisconsin.

The argument from raw murder rates also ignores the fact that a high incidence of murder is likely to create the political demand for the death penalty. If Wisconsin had the murder rate of Texas, Wisconsin voters would likely have long ago insisted that the state execute murderers.

10. See Theodore Black & Thomas Orsagh, *New Evidence on the Efficacy of Sanctions as a Deterrent to Homicide*, 58 SOC. SCI. Q. 616 (1978); Ruth D. Peterson & William C. Bailey, *Felony Murder and Capital Punishment: An Examination of the Deterrence Question*, 29 CRIMINOLOGY 367 (1991); William C. Bailey, *A Multivariate Cross-Sectional Analysis of the Deterrence Effect of the Death Penalty*, 64 SOC. & SOC. RES. 183 (1980); Brian E. Frost, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960s*, 61 MINN. L. REV. 743 (1977); Brian E. Frost, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 J. CRIM. L. & CRIMINOLOGY 927 (1983) (hereinafter Frost, *Capital Punishment*); Jack Gibbs, *Crime, Punishment, and Deterrence*, 48 SW. SOC. SCI. Q. 515 (1968); See also *infra* note 19 for studies that show not only that punishment deters murder, but that *capital* punishment deters murder.

11. As Luksetich and White point out, much of the evidence that murder can be deterred was produced by scholars who challenged Ehrlich's pioneer study supporting the deterrent effect of the death penalty. "Almost without exception, the findings of these studies indicate that the probability of apprehension and conviction and the severity of punishment (length of imprisonment) have a statistically significant, negative relationship with homicide rates." WILLIAM A. LUKSETICH & MICHAEL D. WHITE, *CRIME AND PUBLIC POLICY: AN ECONOMIC APPROACH* 109 (1982).

The next, only slightly more sophisticated, kind of analysis compares pairs of states: on the one hand states that have the death penalty, and on the other states that do not have the death penalty. Thorsten Sellin is famous for this sort of study, and he invariably finds no difference in homicide rates between "abolitionist" states and states that have capital punishment. The problems with this sort of analysis are numerous. In the first place, merely having the death penalty on the books is unlikely to be a deterrent if it is seldom enforced. Yet in several of Sellin's "abolitionist" states, executions were extremely rare or nonexistent in the years he studied.¹² Further, this sort of analysis is entirely dependent on the comparability of the pairs of states chosen. Sellin attempted to insure comparability by using geographically adjacent states. For example, he compared the murder rate in Massachusetts and Connecticut (which had the death penalty) with that in Rhode Island (which did not). Likewise, he compared the murder rate in Minnesota and Wisconsin (no death penalty) with that in Iowa (a death penalty state).¹³ It is obviously questionable to suggest that these states are "comparable," and would be expected to have identical murder rates except for any differences that resulted from the existence of the death penalty.

What of more methodologically sophisticated studies? Not all are necessarily of much use. One body of literature, for example, looks at the murder rate in the days and weeks following highly publicized executions. Some of these studies merely look at executions, but others look at the publicity that surrounds executions. The deterrence hypothesis holds that murders should decline after an execution. And indeed some studies show this,¹⁴ but others show no such effect,¹⁵ and still others show a "brutalization" effect, with murder rates actually increasing after a publicized execution.¹⁶

The problem with any study of this sort is that it makes some rather peculiar assumptions about the psychology and decision-making processes of potential murderers. It assumes that they periodically forget

12. JAMES Q. WILSON, *THINKING ABOUT CRIME* 182 (Vintage Books, rev. ed. 1985).

13. Thorsten Sellin, *Capital Punishment*, 25 FED. PROBATION 3 (Sept. 1961). See also THORSTEN SELLIN, *THE PENALTY OF DEATH* (1980).

14. David P. Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, 86 AM. J. SOC. 139 (1989).

15. Sam G. McFarland, *Is Capital Punishment a Short-Term Deterrent to Homicide?*, 74 J. CRIM. L. & CRIMINOLOGY 1014 (1983); Peterson & Bailey, *supra* note 10; Jeffrey Grogger, *The Deterrent Effect of Capital Punishment: An Analysis of Daily Homicide Counts*, 85 J. AM. STAT. ASS'N 295 (1990).

16. William Bowers & Glenn Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELIQ. 453 (1980).

that a murder conviction in their state can lead to execution. When they forget, they revert to thinking murderers are never executed—until another well-publicized execution reminds them of the reality.

It is not impossible that at least some people reason this way, and thus it is not ridiculous to look for such effects. But it is more likely that most people walk around with an abiding knowledge of what public policy is with regard to murder. A rational individual will understand that the lack of any recent execution does not mean that murder carries no risk of execution. A rational individual will probably not confuse the publicity that accompanies executions in celebrated cases with the actual likelihood of his being executed if convicted of murder. A high rate of executions can result in only a moderate amount of publicity, while the execution of a notorious murderer can cause a huge brouhaha. The execution in Illinois of John Wayne Gacy comes to mind.

In this context, searching for week-to-week variations in the murder rate seems a lot like producing a statistical model of the waves on the ocean. Such a model would tell us nothing about the depth of the water under the waves. It's worth noting, for example, that Cover and Thistle¹⁷ found that year-to-year variations in the number of executions failed to explain murder rates, while a three-year moving average of the number of executions did indeed show the expected deterrent effect. Apparently, potential murderers take a reasonably long-term view, and know that a lack of recent executions does not necessarily demonstrate that the system has become unwilling to impose capital punishment.

To criticize poorly done studies, or to show that certain studies may fail to pick up real, important deterrent effects is not to say that a more sophisticated analysis always shows that capital punishment deters murder. Of the very best studies, some have failed to show a deterrent effect,¹⁸ but others, from scholars such as Isaac Ehrlich, James Yunker, Kenneth Wolpin, Cover and Thistle, David Lester, Stephen K. Layson, and Dale Cloninger, have demonstrated a deterrent effect.¹⁹

17. James Perry Cover & Paul D. Thistle, *Time Series, Homicide, and the Deterrent Effect of Capital Punishment*, 54 S. ECON. J. 615 (1988).

18. Black & Orsagh, *supra* note 10; Frost, *Capital Punishment*, *supra* note 10. See also studies, *supra* note 10, all of which, while showing that punishment deters murder, fail to show that capital punishment provides greater deterrence than imprisonment.

19. Cover & Thistle, *supra* note 17; David Lester, *Executions as a Deterrent to Homicides*, 44 PSYCHOL. REP. 562 (1979); David Lester, *Deterring Effect of Executions on Murder as a Function of Number and Proportion of Executions*, 45 PSYCHOL. REP. 598 (1979); Stephen K. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 S. ECON. J. 68 (1985); James A. Yunker, *Testing the Deterrent Effect of Capital Punishment: A Reduced Form Approach*, 19 CRIMINOLOGY 626 (1982); Dale O.

It is important to understand, however, that the death penalty is so rarely imposed that we could hardly expect its effect to show up in aggregate data, given all the other factors that doubtlessly affect the murder rate. Arnold Barnett, for example, examined one study that found no statistically significant deterrent effect: that of Passell. Barnett found that the model estimated by Passell had a prediction error, in terms of the number of homicides it predicted in forty-three states in 1960, of 1,635. But there were only forty-four persons executed for murder in 1960. If each of these executions had deterred five murders, which would be an excellent "return" in terms of deterrence, the reduction of 220 murders would not have been discernable, within accepted standards of statistical reliability, in Passell's data.²⁰

Given this fact, it is surprising that any studies have found a statistically significant deterrent effect of execution. But it is not surprising that one of the studies showing the clearest deterrent effect of capital punishment, done by Kennedy Wolpin, used data from England and Wales.²¹ Wolpin used data spanning the period 1929-1968. During the early part of this period the probability that a convicted murderer would be executed was approximately fifty percent. In later years (after 1955) the probability dropped to five percent, and then to zero when the death penalty was abolished in 1965. Wolpin, in other words, had data in which the murders deterred by executions were numerous enough to be visible above the statistical "noise" that pervades all data.

One thing to keep in mind, when considering the evidence on the possible deterrent effect of executions, is that the evidence that punishment *generally* does deter crime *generally* is overwhelming. Further, there is strong evidence that more severe punishments deter better than less severe punishments.²² Thus it is reasonable to expect that the most severe punishment—execution—will deter better than a

Cloninger, *Capital Punishment and Deterrence: A Portfolio Approach*, 24 APPLIED ECON. 645 (1992); Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65-3 AM. ECON. REV. 397 (1975); Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977); Kenneth I. Wolpin, *Capital Punishment and Homicide in England: A Summary of Results*, 68-2 AM. ECON. REV. 422 (1978).

20. Arnold Barnett, *The Deterrent Effect of Capital Punishment: A Test of Some Recent Studies*, 29 OPERATIONS RES. 346 (1981).

21. Wolpin, *supra* note 19.

22. Ehrlich, *supra* note 9. See also *supra* notes 10-11. One good recent study is Harold J. Brumm & Dale O. Cloninger, *Violent Crime and Punishment: An Application of the LISREL Model*, 27 APPLIED ECON. 719 (1995).

less severe punishment—life imprisonment.²³ Of course, the logic here is hardly ironclad. It involves extrapolating from what is known—longer prison sentences deter better than short ones—to what cannot be known with much precision—death deters better than a long prison sentence. Such an extrapolation seems more reasonable to me than the opposite assumption: that the deterrent effect of severity disappears when we move beyond long imprisonment to the death penalty.

THE "FUNCTIONAL FORM" OF DETERRENCE

If executions do deter murderers, it is important to consider the precise nature of the relationship. For example, one possible "functional form" is a linear one. It is possible that each execution deters a certain number of murders. Perhaps the first execution in a state deters four murders, and the second four more, and the hundredth execution four murders beyond what ninety-nine executions would deter. It is possible that this is precisely the case. But there are other possibilities.

It is possible, for example, that there is diminishing marginal utility from executions. Perhaps after executions become somewhat commonplace—commonplace enough that every potential murderer clearly understands that they *might* be executed if convicted of murder—further increases change the perceptions of potential murderers very little, and thus change the murder rate very little.

On the other hand, perhaps there is some threshold rate of executions below which murders are simply not deterred. Perhaps people, in their decision making processes, are oblivious to extremely improbable contingencies. Thus most readers will have considered the possibility of dying in a traffic accident, an unlikely but not an absurdly unlikely possibility, but not the possibility of being hit by a meteorite. If this is true, executions will have little deterrent effect until the threshold is exceeded, after which the return will be quite high.

Two things must be said about this "functional form" business. First, we have no idea what the functional form of any relationship between executions and murders is. As we have discussed, it is difficult enough

23. This argument ignores the fact that the real alternative to execution seems to be not life-imprisonment, but rather only a moderately long prison sentence. Death penalty opponents who wish to weaken the case for capital punishment ought to be aggressively promoting "life means life" policies, under which murderers who would otherwise be executed really are imprisoned for life.

to establish a relationship between murders and executions. The data available are clearly not good enough to establish what the nature of the relationship is.

Secondly, the issue has important implications. For example, if executions have diminishing utility, then the death penalty as it is now administered, with relatively few executions, may be getting us a fairly substantial deterrent effect. Following this line of logic, we need not have radical changes in the way the system operates to justify capital punishment. We might wish to execute a larger proportion of convicted murderers for other reasons—because we feel it just or because we do not wish to pay for their long-term incarceration. But the current system can be justified on deterrence grounds.

On the other hand, if the deterrent effect of executions increases as executions increase—with the fiftieth execution having a larger effect than the first execution—then it is striking that the evidence for a deterrent effect is as strong as it is. Supporters of capital punishment should make it a priority not merely to put a law on the books, but to see that it is actually implemented.

DEATH PENALTY AS THE “BEST BET”

While there are good reasons to believe that the death penalty deters murders, and some statistical evidence shows that this is true, I would not claim to *know* that it is true. More importantly, however, no one can reasonably claim to *know* that executions do not deter murders. We thus find ourselves in a situation that is common in policy analysis: we have to have *some* policy, but we are not sure of the costs and benefits of alternative policies.

In cases such as this, the key issue becomes “what are you willing to risk?” I am willing to risk executing murderers, even though it might not deter other murders, while people on the other side are apparently willing to risk the lives of innocent victims who might be saved if the death penalty does indeed deter murder. As Ernest Van den Haag put it:

If we were quite ignorant about the marginal deterrent effects of execution, we would have to choose—like it or not—between the certainty of the convicted murderer’s death by execution and the likelihood of the survival of future victims of other murderers on the one hand, and on the other his certain survival and the likelihood of the death of new victims. I’d rather execute a man

convicted of having murdered others than to put the lives of innocents at risk. I find it hard to understand the opposite choice.²⁴

MISTAKES

Opponents of capital punishment claim that innocent people are executed whenever capital punishment prevails. And of course, if enough people are executed over a long enough period of time, then yes, an innocent person will eventually be executed.

It is important to remember, however, that the best evidence shows that this happens very rarely. Two scholars who strongly oppose the death penalty (Hugo Adam Bedau and Michael Radelet) have claimed that of the 7,000 people executed in the United States in this century, twenty-three were innocent.²⁵ This certainly seems like a relatively small number, but Bedau and Radelet cannot produce even this small number without including a number of questionable cases. The inclusion of Sacco and Vanzetti among the twenty-three seems more an expression of ideological orthodoxy than the result of a cool headed assessment of the evidence. Their claim of innocence for a certain James Adams was attacked in a *Stanford Law Review* article for "disregard of the evidence," and for putting a spin on the evidence that supported their thesis of Adams' innocence.²⁶ There is, the authors concluded, "no persuasive evidence that any innocent person has been put to death in more than twenty-five years."²⁷ In response, Bedau and Radelet admitted to the *Chronicle of Higher Education* that (in the words of the *Chronicle's* reporter) "some cases require subjective analysis simply because the evidence is incomplete or tainted." They admitted this was true of all twenty-three cases that they reported.²⁸

Of course, Bedau and Radelet are correct to insist that other cases of innocent people being executed may well exist, with the historical record that could prove innocence being long gone or inaccessible. It is striking, however, that two writers who strongly oppose the death penalty and have every motivation to report it's miscarriage cannot produce a list

24. ERNEST VAN DEN HAAG & JOHN P. CONRAD, *THE DEATH PENALTY: A DEBATE* 69 (1983).

25. RADELET ET AL., *supra* note 3, at 272-73.

26. Stephen J. Markman & Paul G. Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STAN. L. REV. 121, 133 (1988).

27. *Id.* at 150.

28. Peter Monaghan, *Scholars' Research on Executions Adds Fuel to Death-Penalty Debate*, CHRON. HIGHER EDUC. Jan. 27, 1993, at A8.

of even twenty-three innocent people who were executed without including some questionable and controversial cases.

Further, most of the executions on their list were during an era when the civil liberties protections of the accused were pretty slim compared to today and when successful prosecution of minority groups was easier than it is today. The conclusion of all this is that, yes, if a large enough number of convicted murderers are executed, eventually an innocent person will be executed. But the best evidence is that this will be extremely rare.

GOVERNMENT AND THE DEATH OF INNOCENTS

Some, of course, might say that *any* executions of innocent people are unacceptable, no matter how few. This argument overlooks the fact that governments routinely enforce policies that have the foreseeable effect of taking the lives of some innocent people. When the FDA approves a new drug, it usually expects at least some deaths due to rare and infrequent reactions in some patients. And no nation ever makes war without the sure knowledge that some innocents will be killed. The Gulf War, for example, met what were, by any historical standard, very rigorous standards for "discrimination" in the use of force. A very large proportion of the bombs dropped by American and other allied bombers fell on military targets, and not on noncombatants.²⁹ Yet Iraqi civilian casualties have been estimated to be in the range of 5,000-13,000 people.³⁰

Perhaps more poignant is the fact that current allied economic sanctions against Iraq have caused the deaths of thousands of Iraqis (including many children) through malnutrition and shortages of medical supplies. The purpose of these sanctions is to frustrate the ambition of Saddam Hussein to obtain nuclear, chemical, and biological weapons. Now, no one knows for certain that Saddam would be able to produce such weapons if left entirely alone. And no one can be sure that he would cause anyone any problems if he did. But the fear that he might

29. This is not to suggest that the bombing campaign was as antiseptically precise as the video released by the U.S. military during the war suggested, merely that it was much less indiscriminate and deadly to noncombatants than in previous wars, and was conducted with reasonable regard for noncombatants. See RICK ATKINSON, *CRUSADE* 225-228 (1993).

30. *Iraqi Deaths Report* Author in Row, *FACTS ON FILE WORLD NEWS DIGEST*, Apr. 16, 1992, at 271.

is very well-founded. Those who, before they will support the death penalty, demand certainty that it deters would do well to ponder this issue.

If one cannot execute murderers because some people convicted of murder will be found to be innocent, one has to ask how one can *imprison* people convicted of various crimes when we can be certain that some of them will be innocent. The argument of the opponents is that we can “fix” our mistake by letting someone wrongly imprisoned go free. They fail to explain how we can give the person back the five, ten, or twenty years of his life that were taken. They also fail to deal with the fact that most wrongly imprisoned people actually have only a slim chance of being vindicated and released. Radelet, Bedau, and Putnam, at the conclusion of their anti-death penalty volume, discuss cases of innocent defendants who were not executed.

Often, as we have seen, it was fickle good fortune rather than anything having to do with the rational workings of the criminal justice system that played the crucial role in sparing these innocent defendants. Yet luck was not sufficient to spare them time in prison (often many years), the agony of uncertainty over whether they would ever be vindicated or released, and blighted hopes for a decent life all too frequently destroyed by the ordeal and stigma of a murder conviction. Low though the odds of convicting the innocent are, the odds of innocent prisoners—once convicted—being able to marshal the resources essential to proving their innocence are lower still.³¹

It is striking that these authors do not seem to notice that *every single word in that passage applies with equal force to persons convicted of murder in states without capital punishment*. Merely doing away with the death penalty does not guarantee that nobody will be unjustly convicted of murder. It merely guarantees that they cannot be executed. And if the absence of a death sentence means that juries, judges, governors with the power of clemency, and political activists will scrutinize the evidence against an accused murderer less carefully, then our choice may be between an occasional execution of an innocent person and more frequent prison sentences imposed upon the innocent.

RACE AND EXECUTION

Anywhere there are Politically Correct people, there is some rhetorical leverage to be gained by playing the “race card.” So it is not

31. RADELET ET AL., *supra* note 3, at 271-72.

surprising that opponents of capital punishment talk constantly about the fact that more blacks, in relation to the size of the black population, are executed than whites. This supposedly makes the death penalty illegitimate.

Suppose for a minute that this were true. Note the rather strange logic involved. It is like discovering that a major corporation is discriminating against blacks. What do civil rights activists do? Demand that the corporation stop discriminating? Fix the unfairness? No, they demand that the corporation stop hiring people! To state the obvious: racial disparity does not demand an end to hiring. It only demands an end to discrimination in hiring.

In fact, the evidence of disparity in executions is far different from what the death penalty opponents say it is. Indeed, the opponents of capital punishment have both a "mass market" version of the racial disparity argument and a "specialist" version. *The two are flatly contradictory.*

The "mass market" version states that blacks are more likely to be executed for murder than are whites. And indeed, the number of blacks on death row is disproportionate relative to the entire American population. As Frank Chapman put this argument: "For 48 percent of the death row population in our country to be Black is clearly practicing genocide when you consider that Afro-Americans are only 12 per cent of the population."³²

This position implicitly takes the perspective of the convicted murderer. If a given black is more likely to be executed than a white who has committed the same crime, that black criminal can reasonably claim to have been the victim of racial discrimination. If innocent blacks are convicted and executed more often than innocent whites, we again have racial discrimination.

At this point, one envisions a nation full of Mark Fuhrmans, all busily framing innocent black men for murders they did not commit. But then one notices that black people are far more likely to be *victims* of murder than are white people. Add to this the fact that, as James Q. Wilson has pointed out, the vast majority of murders (over ninety percent) are *intra*racial and not *inter*racial, and you have to conclude that there are more black murderers, per capita.³³ Indeed, the disproportionate number of black executions closely matches the disproportionate number

32. *Political Affairs*, July 1987 (copy on file with author).

33. WILSON, *supra* note 12, at 192-93.

of black murder victims. For example, in 1980 forty-two percent of the victims of murder and nonnegligent manslaughter were black. That number has steadily increased so that in 1993, fifty-one percent of all murder victims were black.³⁴ Data show the average black to be more than seven times as likely to be victimized by a murder or nonnegligent manslaughter than a white. In 1993, 40.8% of all prisoners under a sentence of death were black.³⁵ Between 1980 and 1991, 133 whites and 88 blacks were executed in the United States.³⁶ In other words, about 39.8% of the prisoners executed were black. The conclusion is clear: if proportionately more blacks are executed than whites, it is because more blacks commit murder.

People pushing the notion of racial disparity will note that blacks who kill whites are more likely to receive the death penalty than blacks who kill other blacks. The unfortunate problem with such comparisons is that people who kill others of their own race are very likely to know the person they killed. People who kill people of another race are mostly killing strangers. The two sorts of murders are, in short, very different and not comparable.

What happens when we look at the types of murders that are far and away the most common: whites killing whites, and blacks killing blacks. *Whites who kill whites are more likely to be executed than blacks who kill blacks.*

Sheldon Ekland-Olson, for example, examined data from cases in Texas brought between 1974 and 1983. Ekland-Olson was thus examining the way the system operated *after* the reforms of the sentencing process mandated by the Supreme Court in *Furman v. Georgia*³⁷ and related cases. The choice of Texas was significant, since the death penalty statute in Texas allowed less discretion than statutes in other states such as Florida and Georgia.³⁸

Ekland-Olson showed, first, that the death row population overrepresented offenders who killed strangers and underrepresented offenders who killed acquaintances, a fact that makes clear the uselessness of comparing interracial murders and intraracial murders. Secondly, he showed that offenders who had killed a white were overrepresented, and

34. BUREAU OF JUSTICE STATISTICS, *supra* note 2, at 339.

35. *Id.* at 587.

36. *Id.* at 598.

37. 408 U.S. 238 (1972).

38. Sheldon Ekland-Olson, *Structured Discretion, Racial Bias, and the Death Penalty: The First Decade after Furman in Texas*, 69 SOC. SCI. Q. 853 (1988). It is important to note that Ekland-Olson studied death sentences, rather than actual executions.

those that killed a black or an Hispanic were underrepresented on death row. Finally, as we would expect understanding that the vast majority of murders are intraracial, whites were overrepresented on death row.³⁹ Paternoster, using data from South Carolina on the probability that prosecutors will *seek* the death penalty in a homicide case, likewise found that cases where whites killed whites were much more likely to result in a death penalty request than cases of a black killing a black.⁴⁰

William J. Bowers found that blacks who killed whites, and whites who killed whites were substantially more likely to be indicted for first degree murder, and substantially more likely to be convicted for first degree murder than blacks who killed blacks.⁴¹ The data *tended* to show that blacks who killed whites and whites who killed whites were more likely to be sentenced to death, but Bowers could not establish this with the degree of statistical confidence that applied to the other two findings.⁴² This study is interesting in that the evidence for racial disparity in indictment and conviction is better than the evidence for disparity in sentencing. But of course, it is only the latter that is addressed by the abolition of the death penalty.

Gary Kleck looked at the imposition of death sentences during the years 1967-1978, and at actual executions during the period 1930-1967. He found that, outside the South, black homicide offenders have been *less* likely than white offenders to be sentenced to death or executed. In regard to the South, a pattern of apparent discrimination against black offenders in the early data disappeared in more recent data. Between 1950 and 1967, black offenders and white offenders seemed to be executed at identical rates in the South.⁴³

39. *Id.* at 861.

40. Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983). Consistent with other studies, blacks who killed whites were much more likely to result in a request for the death penalty than whites who kill blacks. But the latter case prevailed in only 3.2% of all homicides in the sample, while in 8.8% of the homicides blacks had killed whites. *Id.* at 767. The rarity of whites killing blacks suggests this category of murder is not comparable to other categories in the data.

41. Not only does the rarity of whites killing blacks make it questionable that those murders are comparable to other murders, it also renders it extremely difficult to make statistical generalizations about whites who kill blacks. In one often cited study by Baldus, only 64 homicide cases out of roughly 2,500 studies involved killings of black victims by white defendants. Statistics based on small numbers of cases are unreliable.

42. William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983).

43. Gary Kleck, *Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty*, 46 AM. SOC. REV. 783 (1981).

This brings us to the "specialist" version of the racial disparity argument: that the criminal justice system discriminates against blacks by its lack of concern for black victims. As Anthony Amsterdam has claimed:

Although less than 40 percent of Georgia homicide cases involve white victims, in 87 percent of the cases in which a death sentence is imposed, the victim is white. White-victim cases are almost eleven times more likely to produce a death sentence than are black-victim cases.⁴⁴

And Randall L. Kennedy, describing the same Baldus study, lamented what he described as the fact that "*in Georgia's marketplace of emotion the lives of blacks simply count for less than the lives of whites.*"⁴⁵

This writer thinks it exceedingly tacky that the opponents of capital punishment, who first adopted an offender-centered concept of justice (when it was convenient to argue that too many blacks are being executed), simply turned on a dime and adopted a victim-centered concept of justice (when the data showed that too many whites are being executed). Whatever premise is convenient, one supposes. Even worse is their tendency to adopt vague rhetoric about the evil of racism in an attempt to cover up the fact that they *have* turned on a dime. And it is a bit aggravating to find articles from authors who clearly *have* data that might show discrimination based on the race of the offender, but who do not present it and choose to discuss the race of the victim instead. One can only conclude that the data on the race of the offender do not show what they wanted it to show.⁴⁶

However, the "specialist" view of the situation appears to be correct. Although we have to be very careful about assuming that white on white murders are empirically equivalent to black on black murders, the data do suggest that the criminal justice system undervalues the lives of black victims. Baldus and his colleagues, for example, used extensive controls for the nature of the murder and the number of aggravating factors present, and still found murderers of white victims to be slightly more likely to be sentenced to death.⁴⁷ But the opponents of the death penalty suggest that we should value the lives of black victims even *less*

44. Anthony G. Amsterdam, *Race and the Death Penalty*, 7 CRIM. JUST. ETHICS 2, 84 (1988).

45. Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988).

46. David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 CRIM. L. & CRIMINOLOGY 661, 709 n.131 (1983).

47. *Id.* at 708.

by executing no murderers of black people. Then to assume racial justice, affirmative action quota style, we should execute no murderers of white victims either!

While we seek to remedy inequities in the American criminal justice system, we would do well to remember the words of Ernest Van den Haag:

Guilt is individual. If guilty whites or wealthy people escape the gallows and guilty poor people do not, the poor or black do not become less guilty because the others escaped their deserved punishment. Whether due to willful discrimination, capriciousness, or unavoidable accidental circumstances, some people will always get away with murder. Is that a reason to deny the justice of the punishment of those guilty persons who did not get away? Their guilt is not diminished by the escape of the others, nor do they deserve less punishment because others did not get the punishment they deserve. Justice involves punishment according to what is deserved by the crime and the guilt of the criminal — regardless of whether others guilty of the same crime escape.⁴⁸

The opponents of capital punishment are pushing an argument they would never use in other contexts. The fact that you parked illegally and did not get a ticket does not relieve me of paying the fine when I do get a parking ticket. The fact that you bamboozled the I.R.S. does not make it acceptable for me to cheat on my taxes.

BLACK PUBLIC OPINION

Contrary to what the Politically Correct people would have you believe, polls show a clear majority of black people favoring capital punishment. The most recent Gallup Poll, for example, found fifty-nine percent of blacks nationwide favoring the death penalty, and only thirty-one percent opposed.⁴⁹ Linda Lichter commissioned a nationwide poll of blacks that contained 600 respondents, more than in any poll that fails to oversample blacks. Among those respondents with an opinion, fifty-five percent favored the death penalty, and forty-five percent opposed.⁵⁰

48. Ernest Van den Haag, "Murderers Deserve the Death Penalty." *The World & I*, November 1989 (copy on file with author).

49. Gallup & Newport, *supra* note 1, at 43. This was in spite of seventy-three percent of black respondents agreeing that "A black person is more likely than a white person to receive the death penalty for the same crime." *Id.* at 45. This shows the success of the "mass market" view of racial disparity discussed above.

50. Linda S. Lichter, *Who Speaks for Black America?*, 84 PUB. OPIN. 43 (Aug./Sept. 1985).

Even sixty percent of the upscale readers of *Ebony* said capital punishment is "the only just punishment" for murder.⁵¹

Now of course, a majority of black Americans can just as easily be in the wrong as a majority of white Americans. These data do show, however, the hollowness of the claim of the anti-death penalty forces to speak for black Americans. In this, as in many other matters, the white liberals and leftists who claim to speak for black people are actually speaking mostly for themselves.

JUSTICE

Finally, we come to the most important consideration. Most Americans feel that the most heinous crimes require that, as a matter of justice, the criminal be executed. They have on their side philosophers like John Stuart Mill, who concluded:

When there has been brought home to any one, by conclusive evidence, the greatest crime known to the law; and when the attendant circumstances suggest no palliation of the guilt, no hope that the culprit may even yet not be unworthy to live among mankind, nothing to make it probable that the crime was an exception to his general character rather than a consequence of it, then I confess it appears to me that to deprive the criminal of the life of which he has proved himself to be unworthy — solemnly to blot him out from the fellowship of mankind and from the catalogue of the living — is the most appropriate, as it is certainly the most impressive, mode in which society can attach to so great a crime the penal consequences which for the security of life it is indispensable to annex to it.⁵²

Likewise Kant, in *The Metaphysical Elements of Justice*, asserted: "Anyone who is a murderer—that is, has committed a murder, commanded one, or taken part in one—must suffer death."⁵³

This, of course, is the same injunction as that of the Mosaic Law, "an eye for an eye and a tooth for a tooth." Opponents of the death penalty ridicule this principle as "cruel" and "barbaric" and characterize the application of it as "revenge." Such statements are usually nothing more than an expression of cultural prejudices. Singularly lacking in the anti-

51. *Ebony's Annual Readers Poll*, EBONY, Sept. 1994, at 43. This was far from being a scientific poll, but is interesting both for the large number of respondents (9,657) and for the relatively affluent nature of the respondents.

52. Hansard's Parliamentary Debates, 3rd Series, London: Apr. 21, 1868.

53. IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 104 (Macmillan Publishing Co. 1985) (1797).

death penalty literature is a coherent argument supporting these assertions. For example, the death penalty is no doubt "cruel," but then imprisoning people is "cruel." The Founders prohibition on "cruel and unusual" punishments recognized this. They did not intend to prohibit cruelty imposed on criminals. They intended to forbid innovative forms of cruelty.

The claim that the death penalty is "barbaric" is equally unsupported by any rational argument. I suppose the assumption is that between the Visigoths (who were barbarians) and the Romans (who were civilized) the Romans must have always been in the right, and the Visigoths in the wrong. This argument does not get one very far, however, since both the Romans and the Visigoths had capital punishment.

As for the "barbarity" of the "eye for an eye, tooth for a tooth" principle: apparently the argument here is that Moses came down from Mt. Sinai a very *long* time ago. Since we want everything to be up to date here in Kansas City, we could not possibly endorse a principle from the distant past.

To state the obvious: it is perfectly possible that there are some timeless ethical principles, and perfectly possible that the Law of Moses embodied these. This should seem obvious to Christians and Jews. Even atheists cannot rule out, *a priori*, this possibility.

In fact, virtually everyone believes that the state should impose evil on people who themselves do terribly evil things. In other words, virtually everyone believes in retribution, which death penalty opponents call "vengeance" when it results in execution of murderers (but not when it results in the incarceration of people who commit rape, mayhem, or tax fraud).

For example, essentially no one believes that a teenager who steals a car and takes a joyride should be punished as severely as a rapist. Conversely, no one believes that a rapist should be treated as leniently as a teenager who takes a joyride in a stolen car. And no one doubts that a man who both rapes and murders a woman should receive a more severe sentence than a man who "merely" raped a woman.⁵⁴ As The Committee for the Study of Incarceration put it:

If one asks how severely a wrongdoer deserves to be punished, a familiar principle comes to mind: *Severity of punishment should*

54. I am of course being a bit mischievous using rape as an example, since it is a "crime against women," and thus politically correct people believe it should be severely punished. This is an example of a bad motivation (political correctness) leading people to a sound conclusion (that rapists should be severely punished).

be commensurate with the seriousness of the wrong. Only grave wrongs merit severe penalties; minor misdeeds deserve lenient punishments. Disproportionate penalties are undeserved—severe sanctions for minor wrongs or vice versa. This principle has variously been called a principle of “proportionality” or “just desserts”: we prefer to call it *commensurate desserts* . . .⁵⁵

Of course, the principle of commensurate desserts leaves open the issue of what punishments are “commensurate.” One can accept the principle of “proportionality” and oppose the death penalty for any of a variety of reasons. The point, however, is that the opponents of capital punishment have no business claiming that retribution as a basis for the criminal justice system is “cruel” or “barbaric” when the issue is capital punishment, while fully accepting the principle in other contexts. They are obligated to make an argument specifically about the death penalty.

The opponents of the death penalty have great difficulty doing so. For example, it is often argued that, when we impose the death penalty, we cheapen the value attached to human life. Further, it is argued that the state is teaching people that killing is acceptable. These arguments were made in the last century and provoked John Stuart Mill to respond:

I am surprised at the employment of this argument, for it is one which might be brought against any punishment whatever. It is not human life only, not human life as such, that ought to be sacred to us, but human feelings. The human capacity of suffering is what we should cause to be respected, not the mere capacity of existing. And we may imagine somebody asking how we can teach people not to inflict suffering by ourselves inflicting it? But to this I should answer — all of us would answer — that to deter by suffering from inflicting suffering is not only possible, but the very purpose of penal justice. Does fining a criminal show want of respect for property, or imprisoning him, for personal freedom? Just as unreasonable is it to think that to take the life of a man who has taken that of another is to show want of regard for human life. We show, on the contrary, most emphatically our regard of it, by the adoption of a rule that he who violates that right in another forfeits it for himself, and that while no other crime that he can commit deprives him of his right to live, this shall.⁵⁶

55. ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 66 (1976)

56. Hansard's Parliamentary Debate, 3rd Series, London: Apr. 21, 1868.

IS DEATH DIFFERENT?

Opponents of the death penalty are thus constantly making arguments against the death penalty that they logically *should* be using against other forms of punishment, but will not. They argue that racial disparity renders the death penalty unacceptable, but not that racial disparity prevents us from imprisoning robbers. They argue that executing murderers demeans human life, but not that imprisoning kidnappers demeans human liberty. They argue that the possibility of mistakes precludes our executing murderers, but not that it precludes our imprisoning them for life. They attack the notion of retribution as "primitive vengeance" when the death penalty is proposed, but insist that the whole criminal justice system be based on the notion of proportionate desserts. This results in long prison sentences for some offenders.

What the opponents of the death penalty need to do is to argue that execution is fundamentally different from imprisonment. Of course, execution is "different." The question is: is it different in a way that renders the arguments for imprisonment (which virtually everyone agrees to be compelling) invalid as arguments for execution? Put differently, is the death penalty like other sanctions, merely more severe, or is there a fundamental incommensurability between execution and even the longest prison sentence?

Readers might ask themselves a series of questions in contemplating this issue. First, "suppose I had the choice between a system of criminal justice where I, even if I were totally innocent, had a one in a million chance (during my entire lifetime) of being arrested, convicted, and executed for murder, or (on the other hand) a system where I had a one in a million chance of being arrested, convicted, and imprisoned for life for murder."

Although vastly inhumane prison conditions might cause us to prefer the former, for most of us this is an easy call: we would prefer to live.

Now, suppose the choice was between a one in a million chance of being unjustly executed, and a one in 500,000 chance of being unjustly imprisoned for life? This choice is a bit tougher, is it not? Suppose the choice is between a one in 10,000 chance of being unjustly imprisoned for life, and a one in a million chance of being unjustly executed? Most of us, I suspect, would accept the risk of execution.

Alternatively, ask yourself this: would I prefer a criminal justice system that would impose upon me a one in a million chance of being unjustly executed for a murder I did not commit, or a one in a million chance of being the victim of murder? Given the horror of being tried

and convicted and awaiting execution on death row, we might prefer a one in a million chance of being shot in, say, a drive-by shooting.

Now, suppose the choice is a one in a million chance of being unjustly executed, or a one in 10,000 chance of being murdered? I would easily opt for the less risky of the two alternatives.

Death penalty opponents might reply that I have not *proven* that any such choice prevails. I have merely assumed that, if capital punishment is instituted a deterrent effect will deter 100 times as many murders as innocent people will be executed.

But in fact I am making *probabilistic* arguments. For my argument to be valid, it is not necessary that executions be proven to deter murders, just that there be a discrete *probability* that they do so. If there is a probability of .5 that the studies showing a deterrent effect are correct, and a .5 probability that they are not, then the prudent course of action is to attempt to deter murders with executions. Put another way, the burden is really on the opponents of the death penalty to establish that it has no deterrent effect. Until they do so, the prudent choice is to execute murderers.

Now the reader may notice that I have not dealt with the issue of executing guilty murderers, but rather with the issue of executing an occasional innocent person. I have chosen to make the more difficult argument, rather than a very easy one. If the average citizen is willing to bear a very slight but very real possibility of being unjustly convicted and executed for murder, in return for a possible deterrent effect and for the sense that justice is being done, then it makes no sense to quibble about the execution of the guilty.

In sum, it is difficult to argue that to execute someone is uniquely unacceptable, among the range of possible punishments. Execution is the most severe punishment we have—clearly more severe than life imprisonment. This severity holds out the promise of a greater deterrent effect, makes the punishment appropriate for the most heinous crimes, and makes a miscarriage of justice a greater evil than would be the case with other punishments. But it does not make the death penalty somehow uniquely unacceptable.

DEATH AND HUMAN DIGNITY

The opponents have on their side not justice but sociology. They are constantly claiming that murderers are the product of unfortunate surroundings—maybe poor, maybe the victims of racial discrimination, perhaps abused as children—and really cannot be held responsible for what they do. Again, it is hard to see why one should make arguments

like this when execution is the issue, and not argue against imprisonment in the same way. If having an unfortunate life means one should not be executed, does it not also mean one should not be imprisoned?

Additionally, if one wants to exempt people from punishment because they have been victims of an unfortunate situation, it is very difficult to see how one can confine the exemption to politically correct "victim" groups. If a young ghetto black teenager who kills someone is to be excused as a "victim of society," is not a member of the Ku Klux Klan who kills a black person *equally* the product of society? His racist attitudes must either be the product of his environment or of his heredity. Since he has even less control over his heredity than over his environment, it is difficult to see how we can fail to excuse him once we start excusing people on the grounds that society really is at fault.

Not all disadvantage, remember, is material. Young people growing up in very comfortable situations can be the victims of *moral* deprivation, perhaps because of their parents' unwillingness or inability to provide moral training, or of unfortunate peer-group influences.

In sum, once we start blaming society for the evil actions of individuals, it is hard to see how we can limit this to murderers for whom solicitude is politically correct. How can we, with any intellectual integrity at all, excuse the woman who kills her abusive husband, and not the enraged husband who kills his unfaithful wife? How can we excuse the poor black teenager who kills a convenience store clerk in a robbery, and not excuse the white teenager from an affluent home who does exactly the same thing?

But there is a more fundamental problem with excusing murderers on account of their unfortunate background. It demeans them by treating them as less than fully responsible human beings who make choices and have to live with the consequences of their choices. It also demeans the achievement of people who faced the same misfortunes, but did not turn into murderers. The opponents of capital punishment are convinced that *they* are free people who make moral choices and are responsible for the choices they make. They ought to accord the same basic human dignity to people who make evil choices.

